

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

INDIANA GAS & CHEMICAL CORPORATION,	} No. _____
<i>Petitioner,</i>	
v.	
KENTUCKY NATURAL GAS CORPORATION,	} No. _____
<i>Respondent.</i>	

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I.

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is found in the record at pages 89 to 94. It is reported as *Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation* (C.C.A. 7, 1942), 129 F. (2d) 17.

II.

JURISDICTION TO REVIEW THE JUDGMENT

This Court has jurisdiction to review the judgment by virtue of Judicial Code Section 240, as amended (U.S.C.A. Title 28, Section 347). The annexed petition, this brief and the record have been filed prior to October 6, 1942, and therefore within the three months prescribed by the Act of February 13, 1925, Chapter 229, Section 8, 43 Stat. 940, U.S.C.A. Title 28, Section 350, since the judgment of the Circuit Court of Appeals for the Seventh Circuit was entered July 6, 1942.

III.

STATEMENT OF THE CASE

The following additional statement is necessary to full presentation of the questions involved:

The contract in suit was executed as part of a plan of reorganization of petitioner's predecessor approved by the United States District Court for the Southern District of Indiana (R., pp. 46-47) and gas deliveries thereunder were made, and to be made, at Terre Haute, Indiana. R., p. 14.

Section 42 and the applicable portion of Section 64 of the Uniform Sales Act in force in Indiana since 1929, read as follows:

"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

Indiana Acts 1929, Ch. 192, Section 42, p. 644; Burns' Anno. Ind. Stat. 1933, Section 58-302.

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance."

Indiana Acts 1929, Ch. 192, Section 64, p. 654; Burns' Anno. Ind. Stat. 1933, Section 58-502.

SUMMARY OF THE ARGUMENT

I.

The Circuit Court of Appeals erroneously refused to follow and apply applicable statutes and decisions of the State of Indiana.

A. Since the contract was made under the jurisdiction of an Indiana court (R., pp. 46-47) and was performable in Indiana (R., p. 14), the right of the respondent-seller to recover damages for petitioner-buyer's non-acceptance of a portion of the goods contracted to be sold was governed by the law of Indiana.

Scudder v. Union National Bank (1875), 91 U. S. 406, 413;

2 Beale, *Conflict of Laws*, Sec. 370.1, p. 1272.

B. Prior to the enactment of the Uniform Sales Act, it was the established law of Indiana that a seller's will-

ingness (as well as ability) to perform the contract was a condition precedent to his recovery of damages for buyer's non-acceptance.

Schreiber v. Butler (1882), 84 Ind. 576, 580;

Magic Packing Co. v. Stone-Ordean Wells Co. (1902), 158 Ind. 538.

C. The Uniform Sales Act, in force in Indiana since 1929, not only does not abrogate, but on the contrary expressly and specifically codifies this rule, providing that the seller must be "ready and willing to give possession of the goods to the buyer *in exchange for the price*," and gives the seller a right of action for non-acceptance only when the buyer "*wrongfully* neglects or refuses to accept and pay for the goods." (Our emphasis.)

Indiana Acts 1929, Chapter 192, Sections 42 and 64, pages 644, 654; Burns' Anno. Ind. Stat. 1933, Sections 58-302, 58-502, quoted *ante*, pp. 13-14.

D. The findings show that during the period May, 1939, to December, 1940, when the petitioner failed to take minimum quantities of gas, the respondent-seller was *never* willing to transfer title to the gas at the agreed price of 30c per MCF, but on the contrary demanded 35c per MCF not only for the gas which petitioner-buyer actually received, but also for the additional necessary to make up the agreed minimum, so that the petitioner has been mulcted in damages for not receiving at 30c per MCF gas which the respondent-seller was never willing to deliver at less than 35c.

Findings 6 and 13, R., pp. 47-48, 56-57.

II.

The decision that a defaulting seller, after a total and unretracted repudiation, persistently unwilling to perform the contract in any particular or to deliver the goods for the agreed price, and guilty of affirmative acts in violation of the contract, might nevertheless recover damages on account of the buyer's non-acceptance of a portion of the goods merely because the buyer refused to accede to the wrongful repudiation and demanded continued performance, is in conflict with applicable decisions of this Court, is contrary to the decisions of other Circuit Courts of Appeals, and contrary to the weight of authority.

A. It is elementary that one who sues upon a contract is bound to show such performance on his own part as entitles him to demand performance from the other.

Norrington v. Wright (1885), 115 U. S. 188, 205, 212;

Skehan v. Rummel (1890), 124 Ind. 347;

Rice v. Fidelity & Deposit Co. (C.C.A. 8, 1900), 103 Fed. 427, 433.

B. Respondent's offer to deliver gas, but not under the contract (R., p. 48) and delivery thereof at a price five cents higher than the contract price (R., p. 57) was not a performance of the contract, but was itself a breach of contract.

Ripley v. McClure (1849), 4 Exch. 345, 359, 360; 154 Eng. Rep. 1245;

Rubber Trading Company v. Manhattan Rubber Mfg. Co. (1917), 221 N. Y. 120, 116 N. E. 789, 790;

5 Williston Contracts (Rev. ed.), Sec. 1294.

C. By the weight of authority, especially in Circuit Courts of Appeals, the petitioner-buyer, notwithstanding continued insistence upon respondent's performance of the contract, might have recovered any damages consequent upon respondent's unlawful repudiation, without further performance on petitioner's part.

Tri-Bullion Smelting Co. v. Jacobsen (C.C.A. 2, 1916), 233 Fed. 646, 649;

United Press Association v. National Newspaper Association (C.C.A. 8, 1916), 237 Fed. 547, 554;

Bu-Vi-Bar Petroleum Corporation v. Krow (C.C.A. 10, 1930), 40 F. (2d) 488, 491, 69 A.L.R. 1295, and Annotation, pp. 1303-1310.

Indeed this rule is established by the Circuit Court of Appeals for the Seventh Circuit.

Lagerloef Trading Co. v. American Paper Products Co. (C.C.A. 7, 1923), 291 Fed. 947, 955.

A fortiori, petitioner's continued insistence that it had a right to full performance did not render petitioner as a defendant liable in damages for non-performance of that which would have been excused petitioner as a plaintiff.

5 Williston Contracts (Rev. ed.), Sec. 1334.

D. The dictum of *Roehm v. Horst* (1900), 178 U. S. 1, 11, that a promisee who fails to treat anticipatory repudiation (anterior to the time of performance) as a breach "putting an end to the contract," thereby "keeps the contract alive for the benefit of both parties," if applicable where the repudiation occurs during performance, obviously does not mean that by so keeping the contract alive the promisee endows the repudiator with power to recover without performance on the repudiator's part.

III.

In refusing to review the sufficiency of facts specially found to support the judgment adjudging the contractual obligations of the parties terminated, and in assuming the correctness of the Trial Court's conclusion to that effect, which was expressly stated as a conclusion of law and not as a finding of fact, the Circuit Court of Appeals erroneously disregarded the provisions of R. S. 700, U.S.C.A. Title 28, Section 875, and of Rule 52 of the Rules of Civil Procedure, and rendered a decision in probable conflict with decisions of this Court.

A. Under R. S. 700, applicable "when an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury," rulings of the court may be reviewed upon appeal and "when the finding is special the review may extend to the sufficiency of the facts found to support the judgment."

R. S. 700, U.S.C.A. Title 28, Sec. 875.

B. Rule 52(a) of the Rules of Civil Procedure for District Courts requires special findings together with *separate* statement of conclusions of law.

Rules of Civil Procedure, Rule 52(a).

C. While the precise question has not arisen in this Court since the adoption of the Rules of Civil Procedure, this Court has uniformly held with respect to review on special findings under R. S. 700, review on special verdicts, review on special findings made by the Court of Claims, and review on special findings in admiralty cases, that the sufficiency of the *facts* found to support the judgment or

conclusions can neither be aided nor diminished by reference to the evidence.

Sun Mutual Insurance Company v. Ocean Insurance Company (1882), 107 U. S. 485; 500;

United States v. Pugh (1878), 99 U. S. 265, 271;

Miller v. Brooklyn Life Insurance Company, (1870), 12 Wall. 285;

Collins v. Riley (1881), 104 U. S. 322, 327.

IV.

Since the Declaratory Judgments Act (Jud. Code 274d, U.S.C.A. Title 28, Section 400) expressly authorizes declaration of rights, whether other or further relief can be awarded, and such a declaration is prospective and may operate as *res adjudicata*, the fact that adjudication of the first alternative issue tendered by plaintiff (respondent) was unnecessary to the relief actually granted by the District Court, did not obviate the duty of either the District Court or the Circuit Court of Appeals to adjudicate this issue.

National Pigments & Chemical Co. v. C. K. Williams & Co. (C.C.A. 8, 1938), 94 F. (2d) 792, 796.

V.

Unexplained failure of the Circuit Court of Appeals to pass upon an assignment of error as to the sufficiency

of the facts found to support the judgment is ground for reversal on certiorari in this Court.

Buzynski v. Luckenbach Steamship Company
(1928), 277 U. S. 226, 228;

Maryland Casualty Co. v. Jones (1929), 279 U. S.
792, 796.

ARGUMENT

The Judgment for Damages

With all due respect to the learned courts below, the adjudication that petitioner-buyer should pay damages to respondent-seller for failing to accept and pay 30c per MCF for gas which the seller never offered except upon condition that petitioner pay 35c per MCF therefor, somewhat resembles something from Alice in Wonderland, and there is a similar difficulty in ascertaining and attacking the premises upon which it is based.

Petitioner has been held liable in damages for breach of an executory promise to receive and pay for goods, i.e., for non-acceptance of goods sold. By Section 64 of Indiana's Uniform Sales Act such liability arises only upon *wrongful* refusal to accept. But the same Act, defining the seller's obligation of delivery (Sec. 42, *ante* p. 13) prescribes that the seller must be ready and willing to transfer the goods "in exchange for the price." It is true that this is said with respect to "delivery" as a condition *concurrent* with "payment."

Here "delivery" was condition precedent to an obligation to pay on the 20th of the following month (R., p. 20), but no reason suggests itself why the credit period should make a tender conditioned upon future payment of an excessive price a sufficient discharge of the seller's obligation, when clearly it would not be so if credit had not been extended.

We submit, therefore, that the Circuit Court of Appeals has erroneously failed to follow the Uniform Sales Act of Indiana.

If for any reason the Uniform Sales Act is deemed inapplicable, the decision is equally incongruous with decisions at common law, both in Indiana and elsewhere. That a seller seeking recovery for the buyer's non-acceptance must have been ready, able and *willing* to deliver *under the contract* is as old as the remedy by special assumpsit, the declaration in which reads in part: " * * * and although the said plaintiff * * * was ready and willing, and then and there tendered and offered to deliver the said goods to the said defendant, and then and there requested the defendant to accept the same, *and to pay him for same as aforesaid*, yet the said defendant, not regarding his said promise and undertaking * * *" etc. II Chitty, Pleading (10th Am. Ed. 1847), p. 264. (Italics ours.)

Scarcity of cases directly affirming such an elementary proposition, does not detract from its force, and the principle is clearly recognized in the Indiana cases of *Schreiber v. Butler*, 84 Ind. 576, 580, and *Magic Packing Packing Co. v. Stone-Ordean Wells Co.*, 158 Ind. 538, 542. Indeed, the distinguished draughtsman of the Uniform Sales Act does not suggest that Section 42 has in this respect changed or added to the common law of any jurisdiction. 2 Williston, Sales (2nd ed), Section 448, et seq. In Indiana, moreover, as almost universally elsewhere, one seeking recovery upon an executory bilateral contract must both allege and prove his own performance or an excuse for non-performance.

Skehan v. Rummel, 124 Ind. 347, 24 N. E. 1089;

Norrington v. Wright, 115 U. S. 188, 212;

Rice v. Fidelity & Deposit Co. (C.C.A. 8th), 103 Fed. 427, 433.

Moreover, the seller's obligation is not discharged by mere physical tender of the goods, accompanied by de-

mands for an exchange performance different and more burdensome than that promised by the buyer. It was so decided in *Ripley v. McClure* (1849), 4 Exch. 345, 359, 360, 154 Eng. Rep. 1245, where it was held that the seller's tender of the proper goods upon unwarranted conditions was so far a breach as to permit the buyer to recover for non-delivery without proving his own performance. In *Rubber Trading Company v. Manhattan Rubber Mfg. Co.* (1917), 221 N. Y. 120, 116 N. E. 789, 790, the Court of Appeals of New York, speaking through Judge, later Mr. Justice Cardozo, said:

"A tender, burdened with the condition that inspection must first be made, and satisfaction stated, was not a tender which answered the requirements of the contract."

Under these decisions, not only was petitioner excused for its failure to receive and pay for all the gas, but such failure would not have barred an action by petitioner for damages consequent upon respondent's breach.

The decision of the Circuit Court of Appeals is only explainable on what is believed to be a patent misapplication of the somewhat ambiguous dictum of *Roehm v. Horst*, 178 U. S. 1, 11, where this Court, stating a rule presumably applicable to so-called anticipatory breach (repudiation anterior to the time of performance) announced that one who fails to treat such repudiation as a breach "putting an end to the contract" thereby "keeps the contract alive for the benefit of both parties." But to say the petitioner's refusal to accede to respondent's wrongful termination, "kept the contract alive," is not to say that it was "kept alive" minus the obligation of respondent-seller to perform the contract, so as to entitle respondent to recover for non-

acceptance of gas which respondent was persistently unwilling to deliver at the contract price. While true that the English, and a minority of American decisions hold that an *anticipatory* repudiation, not acted upon, does not afford the injured party, as plaintiff, an excuse for non-performance of conditions precedent to his own recovery, the majority rule is that "the repudiation though not taken advantage of as a cause of action is, nevertheless, unless withdrawn, operative as a continuing excuse for the failure of the injured party to perform or to be ready and willing to perform. The excuse should be operative without more as a bar to an action by a party whose repudiation stands unwithdrawn, * * *."

5 Williston, Contracts (Rev. Ed.), Section 1334, pp. 3748-49.

The following cases from Circuit Courts of Appeals, including one from the Circuit Court of Appeals for the Seventh Circuit, clearly recognize that the repudiation, unwithdrawn, operates as a continued excuse for the injured party's non-performance, so as to enable him, notwithstanding continued insistence upon the wrongdoer's repentance, to recover of the repudiator without further performance.

Tri-Bullion Smelting Co. v. Jacobsen (C.C.A. 2, 1916), 233 Fed. 646, 649;

United Press Association v. National Newspaper Association (C.C.A. 8, 1916), 237 Fed. 547, 554;

Bu-Vi-Bar Petroleum Corporation v. Krow (C.C. A. 10, 1930), 40 F. (2d) 488, 491, 69 A.L.R. 1295, and Annotation pp. 1303-1310;

Lagerloef Trading Co. v. American Paper Products Co. (C.C.A. 7, 1923), 291 Fed. 947, 955.

The statement of Professor Williston that the excuse "should be operative without more as a bar to an action by a party whose repudiation stands unwithdrawn," would seem to follow *a fortiori*. Certainly it is a most fantastic result to conclude that respondent's wrongful and persistent repudiation of the contract or petitioner's rightful insistence upon its withdrawal *excused respondent* from the obligation to deliver gas *at the contract price* which otherwise would have been condition precedent to respondent's recovery for non-acceptance.

The Circuit Court of Appeals Erred in Refusing to Review the Correctness of the Trial Court's Conclusion of Law that the Parties' Contractual Relations Had Terminated.

This was plainly a question of law, requiring for its decision only (a) interpretation of the contract, and (b) application of its terms to the *facts found*. The Trial Court stated its special finding of *facts*, and stated separately its "conclusion of law" number 2 that "The contract between the plaintiff and defendant of September 1, 1935, was fully and completely terminated on December 31, 1940." R., p. 71. This was plainly not a "Finding of Fact" within the meaning of Rule 52 of the Rules of Civil Procedure, and was just as plainly not intended as such. The specific mandate of Rule 52 that the court "shall state separately its conclusions of law," is rendered nugatory and meaningless if the Appellate Court may treat a conclusion of law so stated as a finding of fact, and thereby assume the correctness of the judgment based thereon. Such procedure would necessarily preclude review of the sufficiency of the finding of facts to support the judgment, except in the rare case where court and counsel might be wholly unable to phrase a sufficient conclusion.

Prior to the adoption of the Rules of Civil Procedure, parties at an action at law tried to the court after proper waiver of jury, might review the sufficiency of facts found to support the judgment, and this right of review was unembarrassed by reference to or absence of the evidence. Under the Act of 1865, which became R. S. 700 (U.S.C.A. Title 28, Section 875), such a special finding is equivalent to the special verdict of a jury.

Sun Mutual Insurance Company v. Ocean Insurance Company (1882), 107 U. S. 485, 500.

In *Collins v. Riley* (1881), 104 U. S. 322, 327, after entry of judgment for Riley upon a special verdict this Court stated the question presented as follows:

“The inquiry, therefore, is not whether the facts stated prevent the court from entering a judgment in favor of Riley, in pursuance of a general finding for him, but whether the facts stated—‘this state of facts as to the interest of Polly Wagoner’—affirmatively establish his right to any judgment against the present defendants for the recovery of that interest.”

At least as early as 1874, this Court clearly distinguished between a trial court’s finding of fact and conclusion of law. In reversing a judgment in ejectment, based upon a special finding of facts and a conclusion of law that title was in certain trustees, rather than in plaintiff, the Court said:

“If it had been one of the facts found by the court below, that the title was still in the trustees, the case would have presented a different aspect.

It is stated only as a conclusion of law, arising upon the facts found. Such findings of facts are regarded in this court in the light of special verdicts. 'If a special verdict on a mixed question of fact and law, find facts from which the court can draw clear conclusions, it is no objection to the verdict that the jury themselves have not drawn such conclusions, and stated them as facts in the case.' The presumption of the reconveyance arises here, with the same effect upon the specific findings, as if it had been expressly set forth as one of the facts found.

The conclusion of law that the title was still in the trustees was, therefore, a manifest error."

French v. Edwards (1874), 21 Wall. 147, 151.

In 1865 this Court adopted a rule applicable to trials in the Court of Claims very similar to Rule 52 of the Rules of Civil Procedure in requiring findings of fact and a separate statement of conclusions of law. 2 Wall. vii. In *United States v. Pugh* (1878), 99 U. S. 265, 271, these rules were interpreted as follows:

"The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal."

The Act of February 16, 1875, c. 77, U.S.C.A. Title 28, Sections 771, 772, required District Courts sitting in Ad-

miralty to "state the facts and conclusions of law separately." In *Sun Mutual Insurance Company v. Ocean Insurance Company* (1882), 107 U. S. 485, applying this statute, said:

"The findings of fact being in the nature of a special verdict, we can go neither behind nor beyond them. We cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference." (Page 500.)

With this historical background, we submit that the Circuit Court of Appeals erred in refusing to review the sufficiency of the facts found to support the conclusion and judgment of the trial court that the contractual relations of the parties terminated December 31, 1940, and in giving controlling force to the Court's conclusion of law on the erroneous presumption that the evidence "justified the finding." There is every reason to conclude that the new Rules of Civil Procedure adopted and did not change the practice prevailing theretofore in cases tried by the Court, where special findings were made.

The Circuit Court of Appeals Erred in Leaving Undecided the Question of Respondent's Right to Cancel the Contract for Petitioner's Alleged Breach.

The first and primary objective of respondent's suit was a declaration that respondent had justifiably terminated the contract for petitioner's alleged breach. Respondent failed to support this claim with proof but it did not dismiss. Had it sought to dismiss, the dismissal would have been an adjudication in petitioner's favor, unless by special leave of Court. Rules of Civil Procedure, Rule 41. The failure of both the District Court and the Circuit Court of Appeals

to decide this issue has left it in the same situation as though such leave had been granted, and petitioner, though entitled to prevail on such issue, is left to relitigate the question, not only in actions already pending (e.g., *Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation* (C.C.A. 7, 1941), 118 F. (2d) 831), where it is now material; but also wherever and whenever the controversy may arise.

Presumably both courts left the issue undecided because of the adjudication (we submit an erroneous one) that the contract had terminated from another cause; and because its determination was not necessary to the granting of other relief. If declaratory relief is to be withheld because issues upon which declaration is sought, though presently and actively in controversy, are not determinative of the immediate and coercive relief awardable, then declaratory judgments, as such, are effectively abolished. The proper view of declaratory relief under the Federal Act is, we submit, that taken by the Circuit Court of Appeals for the Eighth Circuit in *National Pigments & Chemical Co. v. C. K. Williams & Co.*, 94 F. (2d) 792, at pages 796-797, where the Court said:

"In view of the failure of proof to sustain the violations alleged in the notice of October 12, 1934, it is unnecessary to decide that question for the purpose of settling the present controversy. But, since the decree in this suit is a declaratory judgment, prospective as well as retrospective in its implications, it may be regarded as *res judicata* as to future controversies. Therefore the decree should be modified to correct any errors which are pointed out on this appeal."

The Circuit Court of Appeals for the Seventh Circuit has not directly taken a contrary position, but has simply refused to decide the question of petitioner's right to declaratory judgment in its favor, by ignoring petitioner's fifth assignment of error. R., p. 75. This alone has been recognized as ground for reversal of the judgment on certiorari.

Buzynski v. Luckenbach Steamship Company
(1928), 277 U. S. 226, 228;

Maryland Casualty Co. v. Jones (1929), 279 U. S.
792, 796.

We urge, therefore, that the writ of certiorari should issue, that the judgment of the Circuit Court of Appeals should be reversed, that the cause should be remanded with instructions to reverse the judgment of the District Court awarding damages against petitioner, with directions to enter declaratory judgment that petitioner had not been guilty of breach of contract justifying cancellation, and with directions to hear and determine the issue as to termination of the contract, unless this Court shall see fit to determine such issue on the record on certiorari.

Respectfully submitted,

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